

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1922

No. [REDACTED] 269

L. VOGELSTEIN & COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 9, 1922.

(28,702)

(28,702)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 747.

L. VOGELSTEIN & COMPANY, INC., APPELLANT,

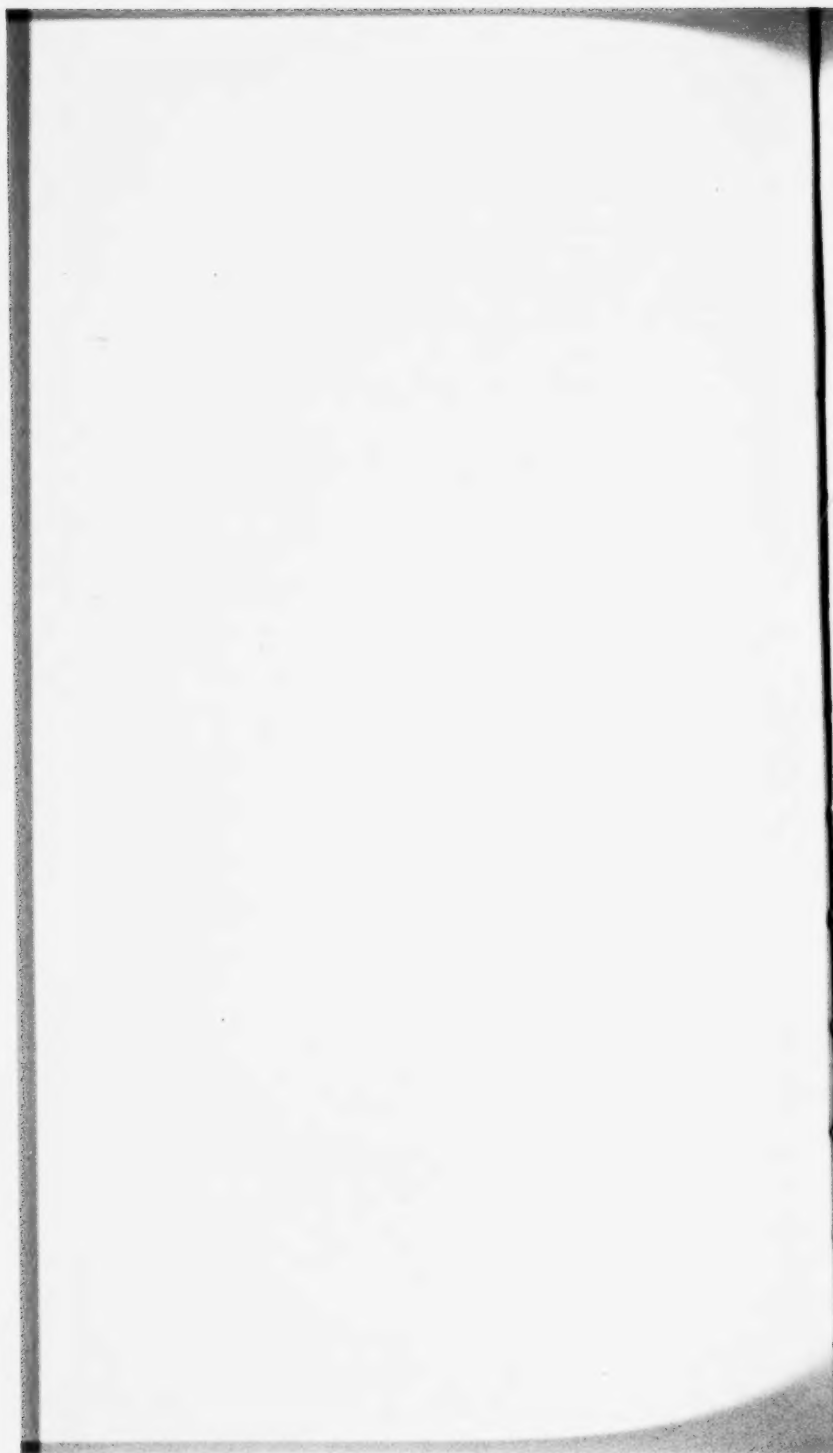
vs.

THE UNITED STATES.

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Court of Claims.

No. 33974.

L. VOGELSTEIN & CO., INC., Claimant,

against

THE UNITED STATES.

1. *Petition. Filed July 2, 1918.*

To the Honorable Judges of the United States Court of Claims:

Your petitioner, L. Vogelstein & Co., Inc., respectfully shows as follows:

I.

That the claimant, your petitioner, is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at No. 42 Broadway, in the Borough of Manhattan, New York City, New York; that it was incorporated in accordance with the provisions of said laws on the 29th day of December, 1916; and that it and all of its officers, directors, stockholders and members have at all times borne true faith and allegiance to the Government of the United States, and that neither it, nor they, nor any of them have or has in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

II.

That, at the close of business on the 20th day of September, 1917, your petitioner was the owner of, and in possession of, twelve million five hundred and forty-two thousand eight hundred fifty-seven (12,542,857) pounds of copper, and continuously thereafter retained the ownership and possession of said copper, or the remaining portions thereof, until all of it was ordered, acquired and taken over by the United States, a portion at a time and at different times, as hereinafter specified and set forth.

III.

That all of said copper had been purchased, acquired and taken by your petitioner by virtue of, and as required by, the terms of long-time contracts of purchase, all of which were made before April 6, 1917, when war was declared between the United States and Germany, and all of which were in force when said copper was so purchased, acquired and taken by your petitioner; that the average

necessary cost price to your petitioner of all of said copper was twenty six and 881,977/1,000,000 (26.881977c.) cents per pound, all of which was paid by your petitioner; that your petitioner was compelled by the various sellers to it, in accordance with their rights under and by virtue of said contracts, to purchase and take and pay for, and it did purchase, take and pay for as so required by virtue of said contracts which were in force at the time, all of said copper at said average cost price per pound; that the reasonable value of all of said copper was at least that price, and that fair and just compensation to your petitioner for the same could not be less than said twenty-six and 881,977/1,000,000 (26.881977c.) cents per pound.

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IV.

That by "An Act for making further and more effectual provision for the national defense, and for other purposes," Approved June 3, 1916 (Public No. 85), it is, among other things, provided as follows:

Sec. 120. "The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry. * * * and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000.

4 The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just."

Sec. 123. "The Secretary of War be, and he is hereby, authorized to prepare or cause to be prepared, to purchase or otherwise procure, such gauges, dies, jigs, tools, fixtures, and other special aids and appliances, including specifications and detailed drawings, as may be necessary for the immediate manufacture, by the Government and by private manufacturers, of arms, ammunition, and special equipment necessary to arm and equip the land forces likely to be re-

quired by the United States in time of war: Provided, That in the expenditure of any sums appropriated to carry out the purposes of this section the existing laws prescribing competition in the procurement of supplies by purchase shall not govern, whenever in the opinion of the Secretary of War such action will be for the best interest of the public service."

V.

That, on or about the 27th day of September, 1917, under and pursuant to the provisions of said act, and in the exercise of all other powers vested in the President by the Constitution and Laws of the United States, as the Chief Executive thereof and as Commander-in-Chief of the Army and Navy thereof, created or called into being by the existence of a state of actual war and by the extraordinary exigencies and requirements thereof, the President of the United States, acting by and through the Secretary of War, placed two orders with your petitioner, each for one million (1,000,000) pounds of said copper, and in each of said orders stated, among other things: "The price to be paid for this material, in accordance with the adoption of a fixed price for copper by the President of the United States, shall be twenty-three and one-half ($23\frac{1}{2}$ c.) cents per lb. f. o. b. New York basis;" that thereafter, under and pursuant to said act and authority and in the exercise of all other said powers, the President of the United States, acting sometimes by and through the Secretary of War and sometimes by and through the Secretary of the Navy, from time to time, placed other and further orders for other portions of said copper with your petitioner, as follows:—during the month of October, 1917, for one million three hundred eighty-nine thousand two hundred ninety (1,389,290) pounds; during the month of November, 1917, for two million nine hundred four thousand twelve (2,904,012) pounds; during the month of December, 1917, for three million four hundred one thousand nine hundred sixty-two (3,401,962) pounds, and during the month of January, 1918, for two million eight hundred forty-seven thousand five hundred ninety-three (2,847,593) pounds and that the entire amount of said copper, for which the President of the United States placed orders with your petitioner as aforesaid, was twelve million five hundred forty-two thousand eight hundred fifty-seven (12,542,857) pounds.

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VI.

That in compliance with said orders placed with your petitioner by the President of the United States, and in obedience to said Act and as required by said act, orders, authorities and powers, your petitioner duly filled and complied with all of said orders and surrendered possession, control and title of all of said twelve million five hundred forty-two thousand eight hundred fifty-seven (12,542,857) pounds of copper to the Government of the United States, and

sold, transferred and made deliveries thereof to and for said Government, as follows:—during the month of October, 1917, two million six hundred eighty-eight thousand four hundred ninety-nine (2,688,499) pounds, delivered a part at a time and from time to time as ordered and directed by said Government, in such quantities and on such days that the average day of delivery for that month was October 18th, 1917; during the month of November, 1917, two million eight hundred fifty-one thousand eight-hundred seventy eight (2,851,878) pounds, delivered a part at a time and from time to time as ordered and directed by said Government, in such quantities and on such days that the average day of delivery for that month was November 17th, 1917; during the month of December, 1917, three million three hundred eighty-two thousand eight hundred forty-four (3,382,844) pounds, delivered a part at a time and from time to time as ordered and directed by said Government, in such quantities and on such days that the average day of delivery for that month was December 20th, 1917; during the month of January, 1918, three million six hundred nineteen thousand six hundred thirty-six (3,619,636) pounds, delivered a part at a time and from time to time as ordered and directed by said Government, in such quantities and on such days that the average day of delivery for that month was January 16th, 1918; but your petitioner, in thus complying with said orders and obeying said act and authority and powers, did not consent nor agree, and it has never consented or agreed nor intended to consent or agree, to accept twenty-three and one-half ($23\frac{1}{2}$ c.) cents per pound in full payment for said copper, or that that amount is just or fair compensation therefor.

VII.

That a price for copper, of twenty-three and one-half ($23\frac{1}{2}$ c.) cents per pound, was determined on and adopted by the President of the United States, on or about the 21st day of September, 1917, and no change in that respect has been made by said President since that time; but that the price or amount so determined on and adopted was not, and is not, fair or just compensation to your petitioner for said twelve million five hundred forty-two thousand eight hundred fifty-seven (12,542,857) pounds of copper, nor for any part thereof; that said price was and is unsatisfactory, and not fair nor just, to your petitioner, who was entitled to receive the same and is also entitled to receive such further payment as will make fair and just compensation for said copper; that your petitioner has received from the Government of the United States, and said Government has paid to it, twenty-three and one-half ($23\frac{1}{2}$ c.) cents per pound for all of said copper, but your petitioner received said payment without waiving any of its rights to further compensation which should be just and fair; and that your petitioner duly notified the Government of the United States and its agents and representatives that your petitioner reserved, and has and does reserve, all its rights to such further payment as would make fair and just its compensation for all of said copper thus necessarily sold,

transferred and delivered by it to the Government of the United States.

VIII.

That twenty-six and 881,977/1,000,000 (26.881977c.) cents per pound, which is the average cost price necessarily paid by your petitioner for all of said copper as aforesaid, is and would be just and fair compensation for the same; that the difference between twenty-three and one-half ($23\frac{1}{2}$ c.) cents and twenty-six and 881,977/1,000,000 (26.881977c.) cents is three and 381,977/1,000,000 (3.381977c.) cents per pound; that your petitioner is entitled to be paid by the Government of the United States the further sum of said three and 381,977/1,000,000 (3.381977c.) cents per pound for each and every pound of said copper sold, transferred and delivered by it to said Government; that the just and full sum, to which it is so entitled is three and 381,977/1,000,000 (3.381977c.) cents per pound on twelve million five hundred forty-two thousand eight hundred fifty-seven (12,542,857) pounds of copper, making Four hundred twenty-four thousand one hundred ninety-six and 54/100 (\$424,196.54) dollars, with interest; that your petitioner has duly demanded payment to it of said Four hundred twenty-four thousand one hundred ninety-six and 54/100 (\$424,196.54) dollars, with interest by the Government of the United States, and that no part thereof has been paid.

IX.

Your petitioner, this claimant, further states that no action has been taken on its said claim before Congress, or by or before any department of the United States; except as hereinbefore expressly set forth; and except further that your petitioner has made an application to the War Industries Board of the Council of National Defense for adjustment of its claim, and that said Board has refused to take any action in the matter.

X.

That your petitioner is the sole and only owner of said claim; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, and that said claimant, your petitioner, is justly entitled to the amount above stated and herein claimed from the United States after allowing all just credits and offsets. That, since the 21st day of September, 1917, when a price for copper of twenty-three and one-half ($23\frac{1}{2}$ c.) cents per pound was determined on by the President of the United States as aforesaid, your petitioner has sold, transferred and delivered to the Government of the United States and its Allies, at that price, large quantities of copper—at least twenty-five million (25,000,000) pounds—which has cost your petitioner substantially the same price ($23\frac{1}{2}$ c. per pound) and on which it has made no profit whatever, and that your petitioner has not made, and is not now

making, any profit on copper sold, transferred and delivered to said Government or its Allies since said 21st day of September, 1917.

Wherefore, your petitioner, this claimant, prays judgment against the United States in the sum of Four hundred twenty-four thousand one hundred ninety-six and $54/100$ (\$424,196.54) dollars, together with interest as follows: on Ninety thousand nine hundred twenty-four and $42/100$ (\$90,924.42) dollars due on account of said 2,688,499 pounds of copper (at 3.381977 cents per pound) the average date of delivery of which was October 18th, 1917, from said October 18th, 1917; on Ninety-six thousand four hundred forty-nine and $89/100$ (\$96,449.89) dollars due on account of said 2,851,878 pounds of copper (at 3.381977 cents per pound) the average date of delivery of which was November 17th, 1917, from said November 17th, 1917; on One hundred fourteen thousand four hundred six and $97/100$ (\$114,406.97) dollars due on account of said 3,382,844 pounds of copper (at 3.381977 cents per pound) the average date of delivery of which was December 20th, 1917, from said December 20th, 1917 and on One hundred twenty-two thousand four hundred fifteen and $26/100$ (\$122,415.26) dollars due on account of said 3,619,636 pounds of copper (at 3.381977 cents per pound) the average date of delivery of which was January 16th, 1918, from said January 16th, 1918.

L. VOGELSTEIN & CO., INC.,

Petitioner,

By LUDWIG VOGELSTEIN,

Its President,

REEVES & TODD,

Attorneys for Claimant.

Office and Post Office Address, No. 165 Broadway, Borough of Manhattan, New York City, New York.

12 UNITED STATES OF AMERICA,
Southern District of New York,
County and State of New York, ss:

Ludwig Vogelstein, being duly sworn, deposes and says: That he is the President of the Petitioner herein and as such has full power and authority to act for it in this matter and to verify its pleadings and petitions including the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason this verification was made by deponent and not by the petitioner is because the petitioner is a corporation.

LUDWIG VOGELSTEIN.

Sworn to before me this 1st day of July, 1918.

ALBERT FRANKEL,

Queens County, No. 1104.

Notary Public.

Cert. filed in Kings County Clerk's Office, No. 55.
 Cert. filed in Kings County Reg. Office, No. 9036.
 Cert. filed in New York Co. Clerk's Office, No. 153.
 Cert. filed in New York Co. Reg. Office, No. 9141.
 Cert. filed in Bronx Co. Clerk's Office, No. 12.
 Cert. filed in Bronx Co. Reg. Office, No. 923.

13 II. *General Traverse. Filed Sept. 3, 1918.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On May 17, 1921, this case was argued and submitted on merits by Messrs. Albert G. Reeves and Russell H. Robbins, for the plaintiff, and by Messrs. Crowley Wentworth and J. Robert Anderson, for the defendant.

14 IV. *Findings of Fact and Conclusion of Law. Entered June 13, 1921.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a corporation duly incorporated on December 30, 1916, under the laws of the State of New York, as L. Vogelstein & Co. (Inc.), with a capital stock of \$5,000,000 divided into 50,000 shares of the par value of \$100 each, and having its principal office and place of business in the city of New York, State of New York. The number of the directors and subscribers is given as three each, among whom is the name of L. Vogelstein with an allotment of 48,995 shares, but by arrangements with the other stockholders all of the 50,000 shares were issued to him. The powers of the corporation under its charter are very broad, allowing it to carry on a large number and variety of different occupations, either as principal or agent, among which is the right to deal generally in and with minerals, ores, metals and metalliferous substances.

II.

The sole business of the plaintiff at the time of the transactions complained of in the petition, and still is, the purchasing of ores, minerals, and metals, having them smelted and refined, and then selling the refined products to its customers. It is not a mine owner, operator, producer, or refiner, but a dealer only in ores, minerals, and metals.

III.

At the close of business on September 20, 1917, the plaintiff had on hand, sold but not delivered, and unsold, 43,851,042 pounds of copper, 34,687,579 pounds of which had been purchased as unrefined copper, under long-term contracts, and 9,163,463 pounds had been purchased as refined copper in the open market. The cost of the entire mass was \$11,788,027.17, and the average cost per pound was 26.881977 cents. Of the entire stock of copper on hand on said date, 31,308,183 pounds had been sold at 26.34389 cents per pound. There remained in the ownership and possession of the plaintiff, 12,542,857 pounds, which he had been unable to sell at the same price, owing to the fact that an agreement between the producers of copper and the Government fixing the price of refined copper at $23\frac{1}{2}$ cents per pound would go into effect on September 21, 1917. The difference between the average cost price of the 43,851,042 pounds of copper, 26.881977 cents per pound, and the selling price fixed by said agreement, $23\frac{1}{2}$ cents per pound, was 3.381977 cents per pound. After September 20, 1917, the market price of copper was $23\frac{1}{2}$ cents per pound.

IV.

There is nothing in the evidence, nor in the records of the plaintiff company, to show the cost price of the 12,542,857 pounds of unsold copper remaining in its ownership and possession on September 20, 1917. All of the unrefined copper purchased by the plaintiff was shipped directly to the United States Refining Company of New Jersey under a contract between the plaintiff and said company, and after smelting and refining was shipped, on order of the plaintiff, by said company to plaintiff's customers. It was impossible for the plaintiff to give, from its records, the cost price of any of the different lots of copper sold by it. It may have sold copper purchased by some other dealer. It only knew how much copper it had in bulk at the refinery.

V.

After the presentation of a report by the Federal Trade Commission on the cost of the production of copper, the War Industries Board of the Council of National Defense called before it the copper producers of the country, and gave notice to the public of such meeting in order that all interests might be represented and nobody excluded. After discussion between the copper producers, represented by a committee, and the War Industries Board, a voluntary agreement was reached, with the approval of the President, a memorandum of which reads as follows:

"After investigation by the Federal Trade Commission as to the cost of producing copper, the President has approved an agreement made by the War Industries Board with the copper producers fixing a price of twenty-three and one-half cents per pound f. o. b. New

York, subject to revision after four months. Three important considerations were imposed by the board. First, that the producers would not reduce the wages now being paid, notwithstanding the reduction in the price of copper, which would involve a reduction of wages under the 'sliding scale' so long in effect in the copper mines; secondly, the operators shall sell to the Allies and the public copper at the same price paid by the Government, and will take the necessary measures, under the direction of the War Industries Board, for the distribution of the copper to prevent it from falling into the hands of speculators who might increase the price to the public; and third, the operators pledge themselves to exert every effort necessary to keep up the production of copper to the maximum of the past so long as the war lasts.

"The War Industries Board felt that the maintenance of the largest production should be assured, and that a reduction in wages should be avoided. The stipulation that the present wages shall not be reduced compels the maintenance of the highest wages ever paid in the industry, which, without such stipulation, would be reduced under the sliding scale with the reduction made in the price of copper. Within this year copper has sold as high as 36 cents per pound, and the present market price would be higher than it is had it not been well known for some weeks that the Government would fix the price.

"The principal copper producers throughout the country have evinced a most patriotic spirit, and for weeks have promptly supplied every request of the Government for copper, without awaiting decision as to price, and agreeing to accept the price which the board would ultimately fix. The proper departments of the Government will be asked to take over the mines and plants of any producers who fail to conform to the arrangement and price, if any such there should be.

"Approved by the President, September 21, 1917."

VI.

For the purpose of carrying into effect the agreement between the copper producers and the Government of September 21, 1917, a meeting of copper producers was called by the Commissioners of Raw Materials of the War Industries Board for September 28, 1917, the minutes of which read:

"A meeting of the copper producers was called at the instance of Mr. B. M. Baruch, Commissioner of Raw Materials of the War Industries Board, and was held at 120 Broadway, New York City, on Friday, September 28th, 1917, at 10.30 a. m. The following persons were present: Messrs. Joseph Clendenin, Charles Earl, S. Rosentamm, L. Vogelstein, Julius Loeb, Julian Beaty, M. H. Crego, T. Wolfson, Sidney Jennings, Charles Nichols, W. Parsons Todd, G. W. Drucker, James McDonald, and H. M. Brush. Mr. Eugene Meyer, Jr., of the Committee on Raw Material, Council of National Defense, was also present. By unanimous consent Mr. Clendenin acted as chairman and Mr. Brush as secretary of the meeting.

"Messrs. Clendenin and Wolfson reported to the meeting the result of the negotiations between the representatives of the United States Government and the representatives of the copper producers, which led to the agreement fixing the price of copper referred to in the statement made public by the President, September 21, 1917, and suggested the necessity of a committee to act for the copper producers in the premises, in view of the problems of production, distribution, consumption, and the like that would arise. Mr. Eugene Meyer, Jr., gave the meeting the benefit of his views as to the need for such a committee and an outline of what he considered would be its proper functions and authority.

"On motion duly made and seconded and unanimously adopted, a committee, to be known as 'The Copper Producers Committee,' composed of Joseph Clendenin, chairman, Tobias Wolfson, James L. McLean, and R. L. Agassiz, was chosen to act for the copper producers in carrying out the agreement made on their behalf with the War Industries Board, set forth in the statement made public by the President, September 21, 1917, to cooperate with the War Industries Board and the Commissioner of Raw Materials, in securing due performance of the agreement, and, under the direction of the War Industries Board, to take the necessary measures to that end.

"On motion duly made and seconded and unanimously adopted, Mr. H. M. Brush was chosen to act as secretary of the committee.

"It was requested that Mr. Clendenin send advice to Mr. Baruch of the action of this meeting of the copper producers.

"The representatives present were asked to submit to Mr. Brush, secretary of the Committee, prior to noon Saturday, September 29th, a statement of their estimated stock of copper on hand October 1st, together with their estimated production of copper for each month, October, November, December, 1917; January, 1918; together with a further statement covering all outstanding sales due as of October 1, 1917, for delivery prior to February 1, 1918. This information was to be assembled and submitted to a meeting of the committee to be held 11 a. m., Monday, October 1st.

"There was no objection raised to the statement that it was the sense of the meeting that all marketable copper, beginning with October 1st, should be placed at the disposal of the U. S. Government and its Allies.

"Upon the plea from Mr. Eugene Meyer, Jr., that the Government was in immediate need of about 12,000,000 lbs. copper, the producers agreed that Mr. Wolfson, secretary of the Advisory Committee, should receive instructions from the Ordnance Department to ship immediately 12,000,000 lbs. of copper, and several of the producers present agreed to receive such instructions in quantities agreed upon from Mr. Wolfson.

"It was suggested that a meeting of the principal consumers of copper should be called for Tuesday afternoon next, October 2nd.

"Upon motion duly made and seconded the meeting adjourned.

"H. M. BRUSH.

"Secretary."

The plaintiff was present at this meeting and placed in nomination the persons who were elected members of the Producers' Committee. He raised no objection at this meeting to furnishing copper at the price fixed in the agreement between the producers and the War Industries Board and approved by the President on September 21, 1917.

VII.

During the meeting on September 28, 1917, Mr. Eugene Myer, Jr., who was present at the request of the Commissioner of Raw Materials of War Industries Board, and who had with him a number of mandatory requisitions for about 12,000,000 pounds of copper, signed by the Secretary of War, and drawn up under the provisions of sections 120 and 123 of the act of June 3, 1916 (39 Stat., 213, 215), commonly known as the National Defense Act, distributed the said orders among producers and dealers present; two for 1,000,000 pounds of copper each were handed to the plaintiff. This was done at their request in order that said producers and dealers might be protected from suits for damages for breaches of their contracts with their private customers, and not because the Government intended to procure copper under such orders. The orders were all identical except as to the person addressed, and the amount of copper to be furnished. The two orders given to the plaintiff read:

War Department,
Washington, September 27, 1917.

To L. Vogelstein & Company,
42 Broadway, New York, New York:

Under the provisions of the act providing for the national defense, passed by Congress and approved June 3, 1916, and particularly under sections 120 and 123 thereof, and in the exercise of all other powers vested in the President by the Constitution and the laws of the United States, as the Chief Executive thereof and as commander in chief of the Army and Navy thereof, created or called into being by the existence of a state of actual war and by the extraordinary exigencies and requirements thereof, the President of the United States, acting through me, Newton D. Baker, Secretary of War, hereby places an order with you for the following: One million (1,000,000) lbs. prime electrolytic copper, to be 99.9% pure and not under 99.88% pure, as provided by the standards of American Society of Testing Materials.

This order shall take precedence over all other orders and contracts placed with you by any individual or individuals, firm, association, company, or corporation whatsoever, except preexisting orders of class A-1 as defined in Circular No. 1 of the Priorities Committee of the War Industries Board of the Council of National Defense, issued under date of September 21, 1917.

Delivery of the copper under this order is to be completed at any time within sixty (60) days from the date of this order, and the entire quantity is to be considered obligated and held subject to re-

ceipt of shipping instructions. Detailed shipping instructions affecting all of this material, or partial amounts aggregating the total involved, will be prepared and issued by the Gun Division, Ordnance Department, whose instructions you are to honor.

The price to be paid for this material, in accordance with the adoption of a fixed price for copper by the President of the United States, shall be twenty-three and one-half ($23\frac{1}{2}$ c) cents per lb. f. o. b. New York basis.

Shipments will be made on Government bills of lading. To facilitate prompt payment of invoice it is desirable that deductions for freight allowance shall be made from the face of the invoice.

The copper to be delivered under this order will be paid for by the Ordnance Department after inspection at the receiving point. Invoices and correspondence regarding this order should be addressed "Gun Division, Office of the Chief of Ordnance, 1330 F Street, Washington, D. C."

Yours truly,

NEWTON D. BAKER,

Secretary of War.

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VIII.

It was understood and agreed between the producers and dealers in copper (including the plaintiff) and the United States that no copper would be required by the United States under the mandatory orders referred to in Finding No. VII, but that the 12,000,000 pounds of copper named in said requisitions would be obtained in the usual way through the contracts between the United States and the United Metals Selling Company, which were entered into from time to time, beginning with April 6, 1917, in the following form:

These articles of agreement entered into the 1st day of November, 1917, by and between the United Metals Selling Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having its general office at No. 42 Broadway, New York, N. Y., the party of the first part (hereinafter called the contractor), and the United States of America, by Jay E. Hoffer, colonel, Ordnance Department, United States Army (hereinafter called the contracting officer), acting by and under the authority of the Chief of Ordnance, United States Army, and under the direction of the Secretary of War, of the second part:

Witnesseth, whereas a state of war exists between the United States of America and the Imperial German Government, constituting a national emergency.

Now, therefore, under the provisions of section 120 of an act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of the United States and Executive orders of the President of the United States, or head of its departments under which the requirements of advertisements for proposals are dispensed with, and contracts in the form hereof duly authorized, and in consideration of the mutual agreements herein contained,

the said parties have agreed and by these presents do agree to and with each other as follows, viz:

Copper.—Article I. The contractor agrees to make and deliver to the United States 65,000,000 pounds, more or less, of electrolytically refined copper, or, at its option, Prime Lake copper, 99.9 per cent pure, and in any event either Prime Lake copper or electrolytic copper is to be not less than 99.88 per cent pure, in accordance with the standards of the American Society for Testing Materials. The United States agrees to pay for the copper herein contracted for, all upon the terms and conditions in this contract set forth.

Deliveries.—Article II. The contractor agrees to deliver to the United States the copper herein contracted for on cars or on lighters at or near plants represented by the contractor, deliveries to begin on or before November 1, 1917, in accordance with shipping instructions of the contracting officer, and to be completed on or before January 20, 1918. Such deliveries will be f. o. b. cars and on lighters at or near plants, providing such plants are on the Atlantic or Pacific seaboard. Should the copper be shipped from refineries in the interior of the United States, such as from Great Falls, Mont., or the Lake plants in Michigan, the contractor will pay the carload lot freight rate prevailing at the time of shipment from such plant to New York, N. Y. Should the contractor be required to make delivery by lighter, the United States will pay for such light-
20 erage service at the prevailing market rates. The contractor agrees to make shipments from such plants as will be most advantageous to the Government's interests, both in the matter of freight and time required for delivery.

The contractor shall deliver the copper herein contracted for to the United States in regular commercial shapes, such as ingot cakes, wire bars, and ingot bars, in accordance with the schedules of the several refineries. Should billets or other extra heavy cakes be called for or be required by the United States, the contractor will be paid the extra charge applying thereto in the particular plant furnishing copper in such shapes.

Time being of the essence, the contractor undertakes to increase the production to such a maximum rate as facilitates and equipment permit.

The performance of this contract shall have precedence over all work for parties other than the United States. The contractor shall from time to time, and whenever requested so to do by the contracting officer, furnish to the contracting officer statements and reports on the progress of the work and any factors bearing on deliveries.

Delays Not Due to Contractor's Fault.—The contractor will not be held responsible for delays in delivery due to the delay of the United States in inspecting, or by other delays due to causes beyond the control and without the fault of the contractor, but, simultaneously with the removal of such causes for delay, the contractor shall proceed with the performance of this contract, due allowance for such delay having been made. The contractor agrees, in view of the

emergency necessitating this contract, to use its best endeavors to remove such cause for delay.

Contractor Will Mark and Ship the Copper.—The contractor at its own expense shall suitably mark the copper and load the same on cars or on lighters, and at the cost of the United States after delivery shall ship the copper to any point in the United States, making all arrangements for transportation, all according to the instructions of the contracting officer.

Purchase Price.—Article III. The sum of \$0.235 f. o. b. cars New York basis, hereby fixed as the purchase price of each pound in weight of the copper, delivered and accepted, will be paid by the United States to the contractor as follows:

Payments.—(1). Upon the certificate of the inspecting and receiving officer, showing delivery and acceptance, the United States will pay the sum of \$0.235 for each pound in weight of the copper delivered and accepted as soon as practicable after such certification.

Prompt Payments.—To facilitate prompt payments the United States may attach a disbursing officer to the main office or plant of the contractor. No payments by the United States shall act to prevent the United States from later disputing the validity thereof under this contract.

Inspection.—Article IV. All materials furnished under this contract, the plant, machinery, tools, and equipment, all workmanship and the copper shall be at all times subject to inspection by the officers or agents of the Ordnance Department or persons designated by the Chief of Ordnance or the contracting officer, and the contractor shall furnish reasonable facilities and assistance for all such inspection, and whatever of the copper does not in all respects fulfill the requirements of the contract shall be rejected.

Should any disputes arise as to the copper delivered being in accordance with specifications, a sample of the copper shall be submitted for analysis to Ledoux & Co., or to Dr. Lucius Pitkin, for determination of the analysis. If they are unable to act, an umpire mutually agreeable to the United States and the contractor shall act, or the contractor and the United States shall request the president of the Chamber of Commerce of New York City to name a chemist or metallurgist of recognized standing to act as such umpire. The fees and expenses involved in such analysis shall be paid by the party in error. Should there be a default in the quality of the copper received, the contractor shall bear the expenses of shipment to and from the point of delivery.

At the option of the contracting officer, inspection of the copper at the mill of the contractor may be waived.

The contractor agrees to immediately replace, without cost to the United States, all copper so rejected. The contracting officer may withhold out of payments to be made hereunder on any account an amount sufficient to cover the cost thereof until proper replacement of rejected copper.

Material, etc., to be Kept Unincumbered.—Article V. The contractor hereby, for the consideration named, waives and releases all

lien or right of lien now existing or that may hereafter arise for work or labor performed or materials furnished or for any other reason or cause under this contract, under any lien laws, State or Federal, upon any material, supplies, and the like coming into its possession which it is herein contemplated shall presently or ultimately become the property of the United States; and the contractor agrees not to create or suffer to be created any mortgage, lien, pledge, attachment, or other incumbrances upon any such materials, supplies, or other property in its possession, and in the event that such mortgage, pledge, lien, attachment, or incumbrance is created the contractor agrees to pay and discharge or, if it disputes the validity of the claim out of which such incumbrance arises, immediately to bond the same to the end that all property shall at all times be and remain free from all incumbrance.

This Contract Not Assignable.—Article VI. This contract shall not, nor shall any right to receive payment or any other interest therein, be transferred or assigned by the contractor to any person, firm, or corporation without the consent of the Secretary of War.

The contractor shall make all subcontracts, purchases, payments, and arrangements for performing this contract in its own name and for its own account, and shall not bind or purport to bind the United States except as the contracting officer shall otherwise direct in writing.

Subcontracts Must Be Assignable and Refer to This Contract.—The contractor shall, unless otherwise directed by the contracting officer, insert in every contract hereafter made for increased facilities, component parts, labor, material, supplies, and the like or otherwise relating to the performance of this contract, a provision
22 that such contract may be assigned by the contractor and that it relates to a "main contract" between the contractor and the United States.

Labor Disputes.—Article VII. In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause delay in making the deliveries upon the date or dates specified the contractor shall address a written statement thereof to the Chief of Ordnance for transmission to the Secretary of War with the request that such dispute be settled, providing such information and access to information within the control of the contractor as the Secretary of War shall require, and it is stipulated and agreed that the Secretary of War may thereupon settle or cause to be settled such dispute, and the contractor agrees to accede and comply with all the terms of such settlement. If the contractor is thereby required to pay labor costs higher than those then prevailing in the performance of this contract prior to such settlement, a fair addition to the contract price of the article shall be made therefor; but if such settlement reduces the labor costs of the contractor, a fair deduction shall be made from the contract price, all as may be determined by the contracting officer. No claim for addition or deduction shall be made unless the same has been ordered in writing.

Officials Not to Benefit.—Article VIII. No Member of or Delegate to Congress or Resident Commissioner, nor any person belonging to or employed in the military service of the United States is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it may be within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109).

Prison Labor.—Article IX. No person or persons shall be employed in the performance of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

Disputes to be Referred to Chief of Ordnance.—Article X. Except as this contract shall otherwise provide any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, it shall have the right to submit the same to the Secretary of War, whose decision shall be final.

Notice.—Article XI. Notice under this contract when not actually given to the contractor shall be deemed to have been sufficiently given to and received by the contractor, when mailed in a sealed postpaid wrapper addressed to the United Metals Selling Co., 42 Broadway, New York, N. Y.

"Contracting Officer" Defined.—Article XII. This contract may be executed in any number of counterparts, all of which together shall constitute one original contract. Wherever the term "Contracting officer" is used in this contract the same shall be construed to mean his successor or successors, his duly authorized agent or agents, or anyone designated by the Chief of Ordnance, from time to time, to act as contracting officer.

23 In witness whereof, the parties hereto have caused this contract to be executed under their seals (in sextuplicate) by their respective officers, duly authorized the day and year first above written.

Signatures:

[SEAL.]

UNITED METALS SELLING COMPANY, *Contractor.*

T. M. WOLFSON, *Vice Pres.*

UNITED STATES OF AMERICA,

By JAY E. HOFFER,

Colonel, Ordnance Department, U. S. Army.

Contracting Officer.

By CHAS. N. BLACK,

Lieut. Colonel, Ordnance Department, N. A.

Witnesses:

C. W. WELCH, *Secretary.*

W. S. CLARKE.

IX.

The plan adopted for obtaining the copper by the Government was for the War or Navy Department to send an order to the United Metals Selling Company directing it to ship a certain number of pounds of copper to some specified party on bills of lading forwarded with the order. This order was sent to the Producers' Committee, which returned it to the United Metals Selling Company with the name of the producer or dealer on whom the order should be made endorsed thereon. Thereupon the United Metals Selling Company placed its own order with the producer or dealer named by the Producers' Committee, requesting that it "please ship" a certain number of pounds of copper to a designated party at a certain time on the attached bill of lading, giving the numbers of the same, and also the number of the contract with the Government against which the order was issued, and stating the price to be paid as $23\frac{1}{2}$ cents per pound. No order was placed with the United Metals Selling Company by the Government unless there was a contract with the company against which it could be charged. Sometimes an order would be sent in advance of the contract, but the contract would always follow. Each order was identified with a specific contract.

X.

The first contract entered into between the United States and the United Metals Selling Company was dated April 6, 1917, and called for the delivery of 20,000,000 pounds of copper, at 16.6739 cents per pound. The succeeding contracts were those of April 21, 1917, for 25,100,000 pounds, at 16.6739 cents per pound; July 21, 1917, for 7,733,389 pounds at $23\frac{1}{2}$ cents per pound; October 15, 1917, for 11,593,345 pounds at $23\frac{1}{2}$ cents per pound; October 26, 1917, for 15,500,000 pounds at $23\frac{1}{2}$ cents per pound; November 1, 1917, for 65,000,000 pounds, at $23\frac{1}{2}$ cents per pound; January 20, 1918, for 100,000,000 pounds at $23\frac{1}{2}$ cents per pound; February 1, 1918, for 50,000,000 pounds at $23\frac{1}{2}$ cents per pound; March 20, 1918, for 50,000,000 pounds, at $23\frac{1}{2}$ cents per pound.

The total number of pounds of copper the said company agreed to deliver to the United States was 343,336,734. The number of pounds delivered by the said company in accordance with the procedure set out in Finding No. IX, from September 21, 1917, to February 1, 1918, the period during which the copper out of which this suit arose was delivered, was in round numbers 283,000,000 pounds.

XI.

Orders were placed by the United Metals Selling Company with the plaintiff in accordance with the procedure described in Finding No. IX at various times between September 21, 1917, and February 1, 1918, for different amounts of coppers. The plaintiff thereupon issued its orders to the United States Metals Refining Company to ship the copper as requested by the order of the United Metals Sell-

ing Company on the bills of lading furnished with said order. During the period from September 21, 1917, to February 1, 1918, the plaintiff shipped through the said refining company to the parties named by said Selling Company in its orders, among other copper, the 12,542,857 pounds which remained unsold in its possession and ownership as described in Finding No. 11, and received therefor from the said United Metals Selling Company compensation at the rate of 23½ cents per pound. The difference between the cost of said 12,542,857 pounds of copper at 26.881977 cents per pound, the rate at which the whole mass of copper, 43,851,042 pounds, on hand September 20, 1917, was purchased, and at 23.5 cents per pound, the rate at which the said 12,542,857 pounds of copper were sold to the United Metals Selling Company by plaintiff, was \$424,196.54. There were shipped by plaintiff during the same period on one of the same orders as the 12,542,857 pounds, 458,803 pounds to the United Metals Selling Company, concerning which no claim is made, because it was copper purchased at 23½ cents per pound, and there was no loss.

XII.

The United Metals Selling Company at the time of the transactions complained of in the plaintiff's petition was a corporation duly incorporated and existing under the laws of the State of Delaware and having its general office at No. 42 Broadway, New York City. The powers of the company under its charter were broad. It was authorized to mine, buy, sell, and deal in copper and other materials. The company, however, in its business confined itself almost exclusively to acting as sales agent for copper-producing companies.

XIII.

The Council of National Defense was created by section 2 of the act of August 29, 1916 (39 Stat., 649, 650) "for the coordination of industries and resources for the national security and welfare," and its organization was completed March 3, 1917. It consisted of the Secretaries of War, Navy, Interior, Agriculture, Commerce, and Labor. It had very extensive powers, among which was authority to organize subordinate bodies for its assistance in special investigations, and in pursuance thereof, by resolution of March 31, 1917, it organized the General Munitions Board, by one clause of which it provided that "such committee shall have no authority at this time to issue purchase orders, make contracts, or bind the Government in the purchases; all these things to be done as at present by the respective departments." By resolution of July 28, 1917, the council organized the War Industries Board to supersede and take the place of the General Munitions Board.

XIV.

The evidence fails to show that either the Council of National Defense or the War Industries Board ever placed, or attempted to

place, any mandatory orders under the act of June 3, 1916, with the plaintiff, or ever entered into, or attempted to enter into, any contracts with the plaintiff to obtain copper or any other metal.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

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V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Thirteenth day of June, A. D., 1921, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that L. Vogelstein and Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from L. Vogelstein and Company, as aforesaid, the sum of One thousand six hundred and ninety dollars and thirty-three cents (\$1,690.33), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

27

VI. *Proceedings After Entry of Judgment.*

On August 11, 1921, the plaintiff filed a motion for a new trial and to amend findings.

On October 10, 1921, the Court overruled said motion.

On October 20, 1921, the plaintiff filed exceptions to overruling of its motion for a new trial.

On November 18, 1921, defendant filed a motion to strike from the files plaintiff's exceptions to overruling its motion for a new trial.

On January 3, 1922, the Court filed an order striking said exceptions from the files.

On January 3, 1922, plaintiff filed an application for appeal.

On January 4, 1922, the plaintiff filed a motion for direction as to the record on appeal, which was submitted in open court.

On January 4, 1922, the plaintiff's application for appeal (filed January 3, 1922) was submitted in open court.

28. On January 7, 1922, at the request of the attorneys of record Messrs. McKenney & Flannery were entered as of counsel.

VII. *Order of Court on Plaintiff's Motion for a Direction as to the Record on Appeal.* Entered Jan. 9, 1922.

In this case it is ordered that the Clerk in making up the record on appeal to the Supreme Court shall observe the rules of the Supreme Court with reference to appeals from this Court. This order is made as a ruling upon plaintiff's motion for a direction as to the record on appeal, filed January 4, 1922.

Jan. 9, 1922.

By THE COURT.

29. VIII. *Plaintiff's Application for and the Allowance of an Appeal.*

Now comes L. Vogelstein & Company, Inc., the claimant herein and above named, by its attorneys of record, Messrs. Reeves & Todd, and prays the allowance by this Honorable Court of an appeal to the Supreme Court of the United States from the judgment entered herein on the 13th day of June, A. D. 1921;

And also from the Order of this Honorable Court entered herein on the 10th day of October, A. D. 1921, denying said claimant's motion to amend the findings of fact filed herein on June 13, 1921, to make additional findings of fact, and for a new trial on errors both of fact and of law as in said motion specified;

And also from the Order of this Honorable Court entered herein on the 3rd day of January, A. D. 1922, directing claimant's exceptions to the overruling of its motion for a new trial, and for amended and additional findings of fact, to be stricken from the files of this Court.

L. VOGELSTEIN & COMPANY,
INC.,

By REEVES & TODD,

Its Attorneys of Record.

McKENNEY & FLANNERY,

Of Counsel.

Filed January 3, 1922.

Ordered: That the above application for appeal be allowed as to the first and second paragraphs.

January 9, 1922.

By THE COURT.

Court of Claims.

No. 33974.

L. VOGELSTEIN & CO., INC.,

VS.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law; of the judgment of the court; of the proceedings after the entry of judgment; of the order of the court on motion as to a direction as to record on appeal; of the plaintiff's application for appeal and allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-fourth day of January, A. D., 1922.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,702. Court of Claims. Term No. 747. L. Vogelstein & Company, Inc., appellant, vs. The United States. Filed February 9th, 1922. File No. 28,702.

(5850)